In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 912

FRED TOYOSABURO KOREMATSU,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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PRELIMINARY STATEMENT.

This is an appeal prosecuted in *forma pauperis* by the appellant, Fred Toyosaburo Korematsu, a native born citizen of the United States of America of Japanese ancestry, and a resident of Alameda County in the State of California, from a judgment of conviction and five-year probationary sentence rendered against him in the United States District Court in and for the Northern District of California in a criminal action based upon an information filed by the United States District Attorney charging appellant with the commission of a misdemeanor, to-wit, a viola-

tion of Public Law No. 503, 77th Congress, 2nd Session, Chap. 191, H. R. 6758, approved March 21, 1942. The statute is now codified as Title 18, U. S. Code, Section 97a. While the appeal was pending in the Ninth Circuit Court of Appeals the appellee filed a motion to dismiss the appeal on the ground the judgment of the District Court below, for want of a sentence to imprisonment, was not a *final decision* within the purview of Title 18, U. S. Code, Section 225(a) from which an appeal lies to Circuit Courts of Appeal. The case comes before this Court upon a Certificate of Questions of Law upon which the Ninth Circuit Court of Appeals desires instruction for the proper disposition of the cause.

QUESTION INVOLVED.

Is a formal judgment of conviction entered by a District Court, sitting without a jury, which contains an unsolicited order placing the defendant on probation for a period of five years pursuant to the discretionary authority lodged in that Court by the provisions of the federal probation statute, Title 18 USCA, Section 724, in lieu of a sentence to imprisonment or the imposition of a fine, or both, authorized by Public Law No. 503, 77th Congress, 2nd Session, Chap. 191, H.R. 6758, now codified as Title 18 USCA, Section 97a, a "final decision" within the purview of Section 128 of the Judicial Code, Title 28 USCA, Section 225(a) First, from which an appeal lies to the Circuit Courts of Appeal?

STATUTES, THE CONSTRUCTION OF WHICH IS INVOLVED HEREIN.

1. Section 128 of the Judicial Code (Title 28 USCA, Section 225(a)), the construction and application of which is involved herein reads, in part, as follows:

> "Review of final decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions * * *
>
> First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

2. The federal probation statute, Title 18 USCA, Section 724, the construction of which is involved herein reads as follows:

> "The courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation. The period of probation, together with any extension thereof, shall not exceed five years."

ARGUMENT.

A SENTENCE TO PROBATION INCORPORATED IN A JUDGMENT OF CONVICTION IS A FINAL DECISION REVIEWABLE BY THE CIRCUIT COURTS OF APPEALS.

Probation is a form of punishment.

Considerable confusion reigns in judicial opinions on the proper use and legal significance of the word "judgment". It has been variously employed, and rather loosely, to signify a conviction, a sentence, a fine and probation. See 16 *Corpus Juris,* p. 1266, Sections 3001, 3002. A sentence is not a part of a judgment however but is based thereon. *People v. Rodrigo,* 69 Cal. 601, 605-606; *Plum v. Beckett,* 120 Cal. App. 507, 510; *Commonwealth v. Lockwood,* 109 Mass. 323, 12 Am. R. 699. It is sometimes described as a "judgment for imprisonment" and a fine is sometimes described as a "judgment for fine". See: *Cal. Penal Code,* Sections 1215 and 1205, and 16 *Corpus Juris,* p. 1266, Section 3001. Rule 1 of the *Rules of Criminal Procedure* (see rules following Section 688 of Title 18 USCA) recognizes the difference between a judgment of conviction and a sentence for it recites that the sentence shall be incorporated in the judgment. The word "sentence" as used therein is not to be construed as restricted to meaning a sentence to prison but as including the imposition of a fine and a placement on probation which are also authorized forms of punishment. A conviction is distinguished from a sentence, a fine and probation which are forms of punishment imposed as incidents to a judgment of conviction. It is the judicial adjudication of guilt in a criminal case. It is the judgment of conviction which estab-

lishes and publishes a defendant's guilt and brands him a criminal. A judgment is not synonymous with a jury verdict (*In re Friedrich,* 51 Fed. 747, 749, affirmed 149 U. S. 70) which is a mere finding of fact by a fact-finding body requiring a judicial act, namely, a formal entry thereon by a Court adjudicating guilt, to convert it into a judgment of conviction. See rule set forth in 17 *Corpus Juris,* p. 30, Section 3290(c). The entry of a pronouncement of guilt by a Court sitting without a jury is also a judicial act constituting a judgment of conviction. It is the adjudication of guilt, that is, the judgment of conviction and not the type of punishment thereafter imposed that establishes and publishes a defendant's guilt and brands him a criminal. *Plum v. Beckett,* supra; *Berman v. U. S.,* 302 U. S. 211, 58 S. Ct. 164; 16 *Corpus Juris* 1266-1267.

A judgment of conviction must incorporate or be followed either by one or a combination of three distinct types of penalties, namely, (1) a sentence to imprisonment, (2) the imposition of a fine or (3) a placement on probation. The two former penalties are authorized by the statute defining an offense and the latter, a placement on probation or sentence to probation, is authorized by the federal probation statute, 18 USCA 724, as a substitutive form of punishment that may be inflicted, in the discretion of the District Court, in lieu of the former types. Probation, a modern legal discovery, may be characterized as a juridical measure designed to relieve deserving convicts from the harshness of statutory penalties. It is significant that a convicted person has no choice in

the selection of any of these penalties. The choice of an appropriate type of punishment to fit the offense is a matter of discretion lodged in the trial Court. Its discretion in fixing the period of imprisonment or the amount of a fine is limited only by the maximums prescribed by the statutes violated. Its discretion in fixing the period of probation is limited to the 5 year period prescribed by the federal probation statute and its discretion in determining the "terms and conditions of probation" by the rule of reasonableness implied in the statute. The entry of either of these three forms of punishment inflicted as an incident to a judgment of conviction would seem to add thereto the element of finality necessary to support an appeal in a criminal proceeding.

A SENTENCE TO PROBATION LENDS FINALITY TO A JUDGMENT AND RENDERS IT APPEALABLE.

In *Berman v. U. S.*, 302 U. S. 211, 58 S. Ct. 164, it was decided that an appeal lies from a judgment of conviction followed by the imposition of a sentence when the execution of the sentence is suspended and a defendant is placed on probation. It is in the misconstruction of a statement in this opinion that the doubt and confusion in our lower courts has arisen as to what constitutes a "final decision" for appeal purposes. The statement is:

> "Final judgment in a criminal case means sentence. The sentence is the judgment. *Miller v. Aderhold,* 288 U. S. 206, 53 S. Ct. 325; *Hill v. U. S. ex rel. Wampler,* 298 U. S. 460, 464, 56 S. Ct. 760, 762."

It was not decided therein that a final judgment always or necessarily means a sentence to imprisonment incorporated in or following a judgment of conviction. It does not decide whether or not the imposition of a fine substituted for a sentence to imprisonment or an unasked for sentence to probation substituted in lieu thereof following the entry of a judgment of conviction or incorporated therein is a final judgment from which an appeal lies. In the *Miller* case, cited in the opinion, a defendant entered a plea of guilty whereupon the trial Court suspended the imposition of sentence permanently and discharged the prisoner. This was declared to be a void act and as "neither a final nor a valid judgment" had been entered the cause was declared to be pending until a sentence inflicting punishment was entered. The prisoner was later recalled and a sentence was passed upon him. The case did not contain a sentence of any type whether to imprisonment, to pay a fine or to serve on probation. In the *Hill* case, cited in the opinion, it is stated that "The only sentence known to the law is the sentence or judgment entered upon the records of the court". It defines a sentence but not a final judgment and the authority it cited for its definition of a sentence was the *Miller* case where the word "judgment" was employed as a synonym for the word "sentence". Obviously where a judgment of conviction is followed neither by a sentence to imprisonment nor the imposition of a fine nor a probationary order there is no final judgment from which an appeal can be taken. In the *Berman* case this Court laid down the tests for appealability as follows:

"In criminal cases, as well as civil, the judgment is final for the purpose of appeal when it terminates the litigation between the parties on the merits" and "leaves nothing to be done but to enforce by execution what has been determined.

"Petitioner stands a convicted felon and unless the judgment against him is vacated or reversed he is subject to all the disabilities flowing from such a judgment. * * * His civil rights may be determined solely by reference to the judgment."

"Placing petitioner upon probation did not affect the finality of the judgment. Probation is concerned with rehabilitation, not with the determination of guilt. It does not secure reconsideration of issues that have been determined or change the judgment that has been rendered. Probation or suspension of sentence 'comes as an act of grace to one convicted of a crime'. Escoe v. Zerbst, 295 U. S. 490, 492, 493, 55 S. Ct. 819. The considerations it involves are entirely apart from any re-examination of the merits of the litigation. Probation was designed 'to aid the rehabilitation of a penitent offender'; 'to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable'. Thus probation cannot be demanded as a right. 'The defendant stands convicted; he faces punishment, and cannot insist on terms or strike a bargain.' Burns v. U. S. 287 U. S. 216, 220, 53 S. Ct. 154, 155. But if final judgment determining his guilt has been rendered, he still has the opportunity to seek by appeal a reversal of that judgment and thus to secure not an opportunity to reform but vindication."

It would seem, by virtue of the reasons announced in the *Berman* case, that the judgment of conviction involved herein which brands the appellant a convicted criminal and contains a sentence to probation which is a recognized form of punishment imposed upon him by the district judge, under the discretionary power reposed in him by the federal probation statute, terminates the litigation between the parties on the merits and constitutes a final decision for appeal purposes within the meaning of 28 USCA 225(a). It would also seem to possess finality for appeal purposes when it is considered that the judgment of conviction and sentence to probation entered herein effectively bar the appellant from again being prosecuted for the same offense under the double jeopardy provision of the Fifth Amendment. (*Commonwealth v. McDermott,* 37 Pa. Super. 1, 6.)

In some jurisdictions, under statutory authority, an appeal is held to lie from a judgment of conviction independently of a sentence. (*State v. Law* (Ala.), 191 So. 802, 805; *Cook v. State,* 19 Ala. App. 666, 100 So. 196.) It is not unusual for an Appellate Court to affirm a judgment of conviction and to reverse and remand as to a sentence. (See *Brooks v. State,* 234 Ala. 140, 173 So. 869; *Ex parte Robinson,* 183 Ala. 30, 65 So. 177, and *Robinson v. U. S.* (CCA-6), 30 Fed. (2d) 25, 29-30.) If an appeal taken only from a sentence, fine or probationary term was permissible and successful it would not wipe out a judgment of conviction whereas a successful appeal from a judgment of conviction would wipe out the penalty inflicted which

is a mere appendage thereto. In *Starklof v. U. S.* (CCA-9), 20 Fed. (2d) 32, it was held that when a judgment of conviction has been pronounced and the Court defers the passing of sentence to the next term of Court an appeal taken before sentence is pronounced is premature. This holding appears to be correct because a judgment of conviction "setting forth the sentence" had not been signed and entered as required by Rule 1 of the Rules of Criminal Procedure. (See Rules following Sec. 688 of 18 USCA.) Had the conviction been entered as required by the rule, although wanting in a sentence, an appeal might have been held to lie therefrom under Rule 3 of the Rules of Criminal Procedure requiring an appeal to be taken from the "judgment of conviction". The language of the *Berman* case seems to suggest that an appeal might lie from the judgment of conviction whether or not a penalty has been imposed.

THE APPEAL HEREIN IS ALSO SUSTAINABLE ON SPECIAL GROUNDS.

In a number of jurisdictions it has been established that an appeal will lie from a suspended sentence where a judgment or order is deemed interlocutory on the ground that to deny an appeal would result in great injustice to a defendant. (*Commonwealth v. Trunk,* 311 Pa. 555, 167 A. 233; *Commonwealth v. Haines,* 130 Pa. Super. Ct. 196, 196 A. 621; *Commonwealth v. Smith,* 130 Pa. Super. Ct. 536, 543, 198 A. 812; *State v. Griffith,* 117 N. C. 709, 23 S. E. 164.) The

denial of an appeal to the appellant herein would result in great injustice to him and would foreclose a decision on issues of tremendous public importance. In criminal cases a void judgment is, under some authorities, sufficient to support an appeal. (*State v. Olsen* (Iowa), 162 N. W. 781; *State v. Rime,* 209 Iowa 864, 226 N. W. 925; *Chapman v. Commonwealth,* 199 Ky. 204, 250 S. W. 844, 846.) It would appear to be a reasonable conclusion that an appeal lies herein from the judgment of conviction which is based upon an unconstitutional and void statute. Another important exception to the general rule that interlocutory judgments are not appealable is that special appeals will lie therefrom in exigency cases. (See *In re Ainsworth v. U. S.,* 1 App. (D. C.) 518, 519, and *In re Gassheimer,* 24 App. (D. C.) 312, 317.) The appeal herein, whether the judgment below be deemed interlocutory or final certainly falls into the classification of an exigency case.

THE LECATO LINE OF DECISIONS.

In *U. S. v. Lecato* (CCA-2), 29 Fed. (2d) 694, 695, cited in the certificate of questions of law upon which the Ninth Circuit Court desires instruction herein, it was held that an appeal was premature for want of a proper sentence where a judgment of conviction had been entered, the imposition of sentence suspended and the defendant put on probation for a specified period on the ground that "when sentence is suspended there is no judgment from which to appeal".

In the Second Circuit a suspension of the imposition of a sentence to prison and the substitution of probation therefore is regarded as an order or judgment interlocutory in character. Similar holdings in the same Circuit following the precedent established in its *Lecato* opinion are *U. S. v. Mook,* 125 Fed. (2d) 706; *U. S. v. Albers,* 115 Fed. (2d) 833; *U. S. v. Zuckerkandal,* 66 Fed. (2d) 388, cert. den. 290 U. S. 673, and *U. S. v. Levinson,* 54 Fed. (2d) 363, cert. den. 284 U. S. 685.

In *Birnbaum v. U. S.* (CCA-4), 107 Fed. (2d) 885, 126 A. L. R. 1207, where the trial Court suspended the imposition of sentence and placed the defendant upon probation an appeal was held premature on the strength of the statement in the *Berman* case that "Final judgment in a criminal case means sentence". The Court refused to regard the order placing the defendant upon probation as a substituted form of punishment equivalent to a sentence to imprisonment or to the imposition of a fine that would lend finality to the proceeding. The Court declared, however, that the question whether the suspension of imposition of sentence to imprisonment and the substitution of an order placing a defendant upon probation finalized the proceeding for appeal purposes had not yet been decided by the Supreme Court in the following language:

> "While the exact question here presented has not been decided by the Supreme Court, great weight must be accorded the fact that in the *Berman* case, supra, that court carefully distinguished a case of this sort from one where the

sentence was imposed and only its execution suspended."

The theory upon which this line of decisions is based is that a judgment of conviction which does not contain a recital of a sentence to prison will not support an appeal because it is interlocutory and not final in nature unless followed by a sentence to imprisonment. This theory allows that the execution of an imposed sentence may be suspended and also that after its suspension the convict may be placed upon probation. Where, however, conviction is first had and a Court thereupon discharges the prisoner or suspends the imposition of sentence and discharges him, which amounts to the same thing, the Court's action is tantamount to an unauthorized dismissal of the action and being void the prisoner is subject to recall for the infliction of an appropriate punishment in accordance with the provisions of the statute violated or the probation statute. *Miller v. Aderhold,* supra. The distinction between suspending the imposition of a sentence upon conviction and placing a defendant upon probation and that of imposing a sentence to prison and thereupon suspending its execution and placing him upon probation is, in substance, a distinction without a difference. It is more apparent than real and amounts to nothing more than saying that in the former instance the probation is subject to revocation and the imposition of a sentence to prison whereas in the latter the probation is subject to revocation whereupon the sentence to prison is revived. There is an interesting summary of cases presented

in the appendix to the *Birnbaum* opinion appearing in 126 A. L. R. 1210 revealing the conflict in the authorities on the effect of suspended sentences. The conflict seems to have stemmed from the failure to consider that probation is a recognized form of legal punishment visited upon an offender in the discretion of the Court and that it is not a matter of choice in the convict.

MANDAMUS DOES NOT LIE TO COMPEL A PRISON SENTENCE.

There is a dictum in *Birnbaum v. U. S.*, supra, suggesting that if a trial Court suspends the imposition of sentence of imprisonment or fine and imposes probation and thereafter refuses to vacate its probationary order and pass sentence to imprisonment or fine when requested so to do by a defendant desiring to initiate an appeal resort may be had to mandamus or to a proceeding in the nature thereof to compel such a sentence to be imposed in order to obtain a final judgment from which an appeal will lie. This followed the view taken by the Second Circuit Court of Appeals in the *Lecato* opinion and its subsequent opinions hereinabove mentioned. The dictum also intimates that a failure of a trial Court to comply with such a request might constitute an abuse of discretion which would justify resort to such a proceeding. However, the Court failed to point out any statute or authority authorizing mandamus or proceeding in the nature of a mandamus in such a case. The federal probation statute, 18 USCA 724, lodges

an absolute discretionary power in a trial Court to suspend the imposition of sentence or fine and to substitute probation therefor. (*Burr v. U. S.* (CCA-7), 86 Fed. (2d) 502, 503; *Ex parte U. S.*, 242 U. S. 27, 37 S. Ct. 72, 61 L. Ed. 129.) The exercise of this discretionary power cannot be construed to be an abuse of discretion. If mandamus or a similar proceeding were to lie to compel a trial judge to impose a jail sentence or fine when the probation statute gives him power not to impose it the absolute discretion vested in him by the statute would be destroyed and the statute nullified. The rule is elementary that mandamus will not lie to compel an inferior tribunal to act or exercise its discretion in a particular manner or to control its discretion when it is exercised within its legitimate jurisdiction. (*Hudson v. Parker*, 156 U. S. 277, 15 S. Ct. 450; *In re Parsons*, 150 U. S. 150, 14 S. Ct. 50; *Ex parte Brown*, 116 U. S. 401, 6 S. Ct. 387; *Ex parte Morgan*, 114 U. S. 174, 5 S. Ct. 825.) See also, *In re Gilbough*, 13 Fed. (2d) 462, where, in a case brought to compel a district judge to determine an application for suspension of sentence under the Probation Law, the Second Circuit Court of Appeals held mandamus did not lie to compel the district judge to exercise his discretion in a particular manner under the Probation Law since a right of review may be had by appeal under Section 128 of the Judicial Code. It states:

> "If a judge's action under the Probation Law is a matter of discretion, then, unless it is abused, there is no ground for appeal or writ."

In the instant case the trial judge exercised his discretion under the federal probation statute by ordering the appellant placed upon probation for a period of 5 years. This sentence to probation was not requested by the appellant. The trial Court and the prosecution at the time were cognizant of the fact that an immediate appeal would be taken to test the constitutionality of the statute violated. The trial Court and the parties entertained the opinion that a probationary sentence was an appealable judgment. Thereafter, while the appeal was pending, the appellant unsuccessfully moved the trial Court to resentence him to imprisonment or to impose a fine, or both, and then, if the Court saw fit, to suspend the execution thereof and order him again on probation in order to obviate the filing of a motion to dismiss the appeal. This motion together with the order denying it were thereafter incorporated in the record of the appeal by the stipulation of the parties and the order of the Ninth Circuit Court of Appeals.

Can it be said that an appeal does not lie herein where the trial Court, in a proper exercise of his discretionary power, originally sentenced the appellant to probation and, thereafter, refused to enter an imprisoning or fining sentence when his refusal was based upon the discretionary power conferred upon him by the federal probation statute? Must the appellant resort to a mandamus proceeding not authorized by any known statute or to a nebulous proceeding in the nature thereof which is nowhere defined merely to obtain a type of penal sentence differing in

degree and form from the probationary sentence already imposed upon him before he can prosecute an appeal to relieve himself from the judgment of conviction branding him a criminal?

RULE OF PROCEDURE SUSTAINS APPEAL HEREIN.

Rule 1 of the *Rules of Criminal Procedure* (see Rules following Sec. 688 of 18 USCA) requires that after a finding of guilt by the trial Court *"sentence shall be imposed without delay"* and that the *"judgment setting forth the sentence shall be signed by the judge who imposes sentence"*. The foregoing decisions of the Second Circuit appear to ignore the fact that the word "sentence" as used in Rule 1 and also in Rule 3 is a generic word meaning "punishment" and must necessarily comprehend the imposition of a "fine" and also the imposition of "probation" and is not restricted to meaning an "incarceration" in prison. They would also appear to ignore the fact that, under Rule 3 of the *Rules of Criminal Procedure, "An appeal shall be taken within five (5) days after the entry of judgment of conviction"*. The notice of appeal from a judgment of conviction incorporating an order placing a defendant upon probation must be filed within five (5) days after the entry thereof under Rule 3 or the right to appeal is waived. (*Nix v. U. S.* (CCA-5), 131 Fed. (2d) 857. See also, *Batson v. U. S.* (CCA-10), 129 Fed. (2d) 463; *Meyer v. U. S.* (CCA-5), 116 Fed. (2d) 601; *Miller v. U. S.* (CCA-5), 104 Fed. (2d) 343, cert. den.

308 U. S. 549, and rehearing denied 308 U. S. 634.) It is material to the consideration of the question involved herein that the formal judgment of conviction entered herein contains a recital of the sentence to probation in compliance with the requirement of Rule 1 and that the notice of appeal was timely filed in compliance with the requirement of Rule 3.

QUESTION CERTIFIED HAS AUTHORITY FOR ANSWER IN THE AFFIRMATIVE.

The precise question involved herein was answered in the affirmative by the Fifth Circuit Court of Appeals as observed in the certificate of questions of law upon which the Ninth Circuit Court of Appeals desires instruction herein. In *Cooper v. U. S.*, 91 Fed. (2d) 195, 199, an order placing defendants upon an unasked for probation pursuant to power lodged in the District Court by the federal probation statute following the entry of a judgment of conviction constituted a final decision for appeal purposes within the purview of Section 128 of the Judicial Code, Title 28 USCA, Section 225(a) First. The opinion states:

> "The Coopers moved the court to finally sentence them instead of suspending sentence on counts 2 to 9, inclusive, and they contend that the refusal denies them the speedy trial guaranteed by the Sixth Amendment of the Constitution. It is true that a trial is not complete until sentence is passed, and that the record cannot be held open unreasonably. But the court here evidently acted under the Probation Act, Sec. 1, 18 USCA 724,

> which expressly sanctions the suspension either of the imposition of sentence or of its execution after provided the convicted person is put on probation under the act. The probation is not pardon, either conditional or absolute, for the power of pardon is vested in the President. It is an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline. The probationer is not a free man, but is subject to surveillance, and to such restrictions as the court may impose. We do not agree with appellants' contention that probation, like pardon, may be refused by the convicted person. The act vests a discretion in the Court, not a choice in the convict. The probation here imposed is rather loose and informal, but is authorized by the act."

On December 23, 1942, the Fifth Circuit Court of Appeals in *Nix v. U. S.*, 131 Fed. (2d) 857, held an unsolicited order placing a defendant upon probation following a judgment of conviction was a final decision from which an appeal lies if notice of appeal is filed within the time allotted which commences to run from the date of the entry of the probationary sentence contained in the judgment of conviction. The appeal was dismissed because this notice was filed too late. The opinion recites:

> "The judgment of conviction occurred then (1937), and an appeal from it must, under Rule III for Criminal Procedure, 18 USCA, following section 688, be taken within five days, unless a motion for a new trial be made. Fewox v. U. S. (5th Cir.), 77 Fed. 2d 699; Miller v. U. S., 5th

Cir., 104 Fed. 2d 343; U. S. v. Tousey, 101 Fed. 2d 892. No provision is made for delaying appeal because of putting of the defendant on probation. Probation does not set aside the judgment of conviction, even when the imposition of sentence is suspended, because probation can only be visited on a convict, and is itself a form of mild punishment. Cooper v. U. S., 5th Cir., 91 Fed. 2d 195. If a probated convict is dissatisfied at his conviction he can and must appeal at once."

In *U. S. v. La Shagway* (CCA-9), 95 Fed. (2d) 200, a judgment of conviction had been entered containing a recital reserving the right of the trial Court to consider an application for probation to be made *in futuro*. The reservation of this right was held to be void. The order releasing the defendant on probation, granted upon his application after he had served a portion of his prison term, was declared to constitute "a final decision terminating the proceeding" from which an appeal lies. The Court declared that "An application for probation is not directed toward the final judgment of conviction (see *Benson v. U. S.*, 93 Fed. (2d) 749), but is in the nature of an independent proceeding". Probation, however, whether imposed by a trial Court at the time of conviction or granted subsequently upon an independent application made by a convict is an incident to a judgment of conviction. If the government can appeal from an order granting probation why cannot a defendant appeal from probation imposed upon him which he considers undeserved and illegally imposed upon him as a mere incident to a conviction had un-

der an unconstitutional and void statute? Can it be said that an appeal does not lie in the instant case from the judgment of conviction containing an unasked for sentence to probation but that it lies from the order sentencing him to probation? It would seem to follow that the appeal herein is sustainable not only as an appeal from the judgment of conviction below but also as an independent appeal from the sentence to probation which involves the same issues.

CONCLUSION.

If an appeal were to be held not to lie herein from an unsolicited order placing the appellant upon probation made at the time of his conviction, a trial judge, without abusing the authority lodged in him by the federal probation statute, either capriciously or unintionally could prevent appeals from his own decisions. Within the scope of the statutory authority conferred upon him he could refuse to impose an imprisoning sentence and could put a defendant upon probation for the statutory period. While the probationary period was running no appeal could be taken for lack of such a sentence. At the conclusion of the period no appeal could be taken for an imprisoning sentence would still be wanting, the trial Court's power to impose sentence would have lapsed and the defendant automatically have been released from the onus of the probationary sentence. The record, however, would still reveal a judgment of conviction branding the defendant a criminal. The defendant's reputation

would be ruined and, if the conviction were for felony, he would suffer a loss of his civil rights. He would have been deprived of the right to a fair and speedy trial and the incidents thereof guaranteed by the Sixth Amendment and of the right to vindicate himself from the stigma of crime. If appeals were declared to be allowed at the expiration of the probationary sentence our Courts would be faced with a multiplicity of appeals from convicts seeking to clear their records and there would, in truth, be no end to litigation. The question of law propounded by the Ninth Circuit Court of Appeals should be answered in the affirmative.

Dated, San Francisco, California,
May 5, 1943.

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